BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
BENEFIT DECISION

In the Matter of:

CHRISTINE N ACKERMAN
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-475
Case No. 92-12053

S.S.A. No.

PEARSON FORD
(Employer)
c/o COLLISTER & CO

Employer Account No.

Office of Appeals No. SD-53692

The employer appealed from the decision of the administrative law judge which held the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was not relieved of benefit charges.

STATEMENT OF FACTS

The claimant worked as a secretary for a car dealership for three years at a final rate of pay of $1,700. Her last day of work was May 5, 1992. The claimant quit because of alleged sexual harassment.

In December of 1991, the claimant was subjected to the first in a series of actions by her co-worker, who was the top salesperson for the employer. He leaned over her desk, looked down her blouse and made a comment about her cleavage. She told the salesman she did not appreciate his comment. He then apologized and left.

Several weeks later the salesman began to follow the claimant to her car. The salesman would continually ask the claimant if they could go to lunch together. She responded "no" twice and the remaining five times either ignored him or laughed.

On another occasion, the salesman came to the claimant to ask for his commission check. He asked the claimant if she was wearing panties and, if so, their color. The claimant ignored these comments.

On April 28, 1992, the claimant was leaving a sales meeting when the same salesman leaned over and purposefully bumped into her. The force of the blow knocked the claimant into a door frame with such force that she injured her shoulder. The claimant punched the salesman in the stomach. He grabbed her buttocks as she tried to walk away from him.

The claimant was extremely upset about the incident. She immediately advised the owner's secretary and the owner's wife of the incident. The secretary advised the owner. The claimant talked to the two women because she did not feel comfortable talking to the owner.

The owner talked to the salesman about the incident late that afternoon. The salesman admitted purposefully bumping into the claimant but claimed she had helped the incident along.

At work the next day, the claimant requested that the owner call the salesman into the office to straighten out the situation. The owner refused to call the salesman in for a meeting. He told the claimant she was an attractive woman and that the incident was a two-way street. The owner stated that if the salesman had grabbed his wife he would have resorted to bodily force. He further stated that the claimant would receive a written apology, and a letter had been placed in the salesman's personnel file. The claimant was too upset to continue working and was allowed to take two and one-half days of vacation.

On the Monday of the following week, the claimant returned to work to find the salesman still working, with no apparent action having been taken by the owner. She never received a written apology.

The next day the claimant described the actions of the salesman to her supervisor, the business manager, and told him she was resigning because of those actions. She then went to speak with the owner, explaining that she could not continue to work there if the salesman was allowed to touch her in a demeaning way. She felt that she was being treated like a "piece of meat" and was "degraded". The owner replied that a "couple of girls" were investigating the incident.

The claimant did not believe the owner would take action to stop the harassment, so she tendered her resignation.

The committee to investigate the claimant's allegations interviewed the two male employees who allegedly witnessed the final incident and concluded the claimant's allegations were unfounded. No one interviewed the owner's secretary, in whom the claimant had been confiding since January of 1992, the owner's wife or other employees.

The employer has a written policy which prohibits sexual harassment and provides that employees who violate the policy will be disciplined. An employee who does not feel comfortable speaking with his or her supervisor can speak with the general manager or arrange through the general manager to speak with a female supervisor.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she left his or her most recent work voluntarily without good cause.

Sections 1030 and 1032 of the Unemployment Insurance Code provide that the employer's reserve account shall be relieved of charges if the claimant left his or her most recent work voluntarily without good cause.

The Appeals Board held in Precedent Decision P-B-27 that there is good cause for a voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

Section 1256.7 of the Unemployment Insurance Code provides that sexual harassment is good cause for leaving employment if a reasonable effort is made to preserve the employment relationship in cases in which such effort would not be futile. "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, and any other verbal, visual or physical conduct of a sexual nature when any of the following occurs:

1. Submission to the conduct is either explicitly or implicitly made a condition of the employment.

2. Submission to or rejection of the conduct is used as the basis for employment decisions affecting the individual.

3. The conduct has the purpose or effect of interfering unreasonably with the individual's job performance or creating an intimidating, hostile or offensive working environment.

In Ellison v. Brady (9th Cir. 1991) 924 F. 2d 872, the court held that the standard to determine whether a co-worker's acts have created an intimidating, hostile or offensive working environment is that of the reasonable woman and not of the reasonable person. The court stated:

> "... a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the work place on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living'."

Given that the Ninth Circuit Court of Appeals has adopted the reasonable woman standard as the basis to determine if a co-worker's act creates a hostile working environment, we believe it is appropriate to use that standard in interpreting and applying section 1256.7.

There is no evidence in the case before us that the claimant's submission to the salesman's conduct was made a condition of the employment or the basis for employment decisions affecting the claimant. Accordingly, sections 1256.7(1) and (2) are not applicable in this case.

The issue we address is whether the salesman's conduct created an intimidating, hostile or offensive working environment for the claimant under code section 1256.7(3). The conduct in question ranged from comments about the claimant's body and undergarments to pestering the claimant to accompany her home to sexual battery. The claimant confronted the salesman twice and obtained his apology. The salesman knew that his actions were unsolicited and offensive to the claimant. In the final incident, the salesman deliberately knocked the claimant into a door frame and grabbed her buttocks. This caused the claimant to feel she was being treated like "a piece of meat" and she would never know what to expect next. Under these circumstances, we conclude that a reasonable woman in the claimant's situation would feel that the salesman's acts had created an intimidating, hostile and offensive working environment.

We now consider whether the claimant took reasonable measures to preserve the employment. Before the final incident the claimant attempted to discourage the salesman's actions. She had tried ignoring him, refusing his requests to accompany her home, expressing her disapproval of his comments and exacting apologies from him. After the co-worker bumped into her and grabbed her in public, she spoke to both the owner's secretary and wife with the intent that these individuals would tell the owner. The owner was told of the incident by both of these individuals. The employer knew that the claimant was being subjected to unwelcome sexual advances.

The remaining issue is whether the claimant acted reasonably in concluding that no action would be taken and resigning despite the owner's announcement that an investigation would ensue.

In response to sexual harassment, an employer must take measures reasonably calculated to end the harassment (Intlekofer v. Turnage and Veteran's Administration, (9th Cir. 1992) 973 F.2d 773. Such measures must be prompt, effective and must include disciplinary action.

Here, the employer's policy provided that sexual harassment would result in discipline of the offending employee. However, the employer's response was neither prompt nor effective but instead was ambivalent and delayed. The owner declined the claimant's request to meet simultaneously with the salesman and the claimant. In response to her complaint, the owner stated that she was an attractive woman and told the claimant the final incident was a two way street. The owner promised a written apology, but the claimant never received an apology. Although the claimant was out of the office for two and one-half days following the final incident and prior to her resignation, the owner did not appoint a committee to investigate until she had returned to work. We cannot say that the owner's response to the claimant's complaint was reasonably calculated to end the harassment nor was it reasonably calculated to ascertain whether harassment had taken place. Therefore, we find that the claimant reasonably concluded that the employer would take no action with respect to the harassment and that any further complaint would have been futile. Accordingly, it is concluded that the claimant is not disqualified from receiving benefits under section 1256.

DECISION

The decision of the administrative law judge is affirmed. The claimant is not disqualified from receiving benefits under section 1256 of the Unemployment Insurance Code. The employer's reserve account is subject to charges.

Sacramento, California, May 11, 1993

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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